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## BURDEN OF PROOF IN WILL CONTESTS CHARGING INSANITY OR UNDUE INFLUENCE.

One of the hardest things for some lawyers to learn is the rule which determines the burden of proof in will contests where the mental condition of the testator is in issue. One lawyer representing the contestees of a will informed us recently that he had lost a will contest because his opponent, a winning pleader before a jury, had the opening and close. We made him feel much discomfited when we apprised him of the fact that he was entitled to the privilege, which his opponent had used to such great advantage.

All lawyers are willing to concede that the proponent of a will has the burden of proof at the time the will is probated, but that on a contest, after they have made the usual formal proof of the execution of the will and that the testator was of sound mind by the attesting witnesses, they have then made a *prima facie* case and the burden then rests upon the contestant to the end of the trial, and therefore the latter has the right to open and close and must establish his case by a preponderance of the evidence.

Still other lawyers will contend that the burden of proof rests solely throughout on proponent, never shifts, and forces the contestee to prove the sanity of his testator beyond a reasonable doubt.

Both of these extreme positions are partly right and partly wrong. The rule is this: The proponent of the will has the burden of proof all through the entire proceeding, no matter what may be proved or not proved and is therefore entitled to the open and close in the argument before the jury. This burden, however, is not uniform and varies with the degree of proof offered. The proponent makes out a *prima facie* case when he proves the execution of the will and the testator's sanity by the attesting witnesses. It then devolves on the contestants to attack the sanity of testator, which the proponents may rebut by proper evidence or they may rely on the presumption of sanity, which operates in their favor but does not change the burden of proof. The instructions of the court must then inform the jury that the burden is on the proponent to show that the testator was of sound and disposing mind but should not neglect to inform them that this proof need not all be in the form of evidence, that there is a strong presumption of fact, recognized by law, which operates in favor of the contestees, to-wit, the presumption that every man is sane until he is proven insane.

These distinctions are clearly set forth in the recent case of Hopkins v. Wampler (Va.), 62 S. E. 926, where the court held that though the burden of proof rested on the proponents of a will throughout the entire proceedings that nevertheless they were materially aided by the presumption of sanity of which it was imperative that the trial court should inform the jury. Practically, this presumption of sanity is so strong, as to throw the apparent *onus* upon the one who charges the testator with being of unsound mind, but this fact does not change the burden of proof which still rests on the proponent entitling him to the open and close in the argument to the jury.

It is difficult sometimes to clearly explain the situation which throughout a will contest imposes the burden of proof on the proponent while the apparent *onus* of proving insanity rests on the contestant. It may assist a clearer understanding of this rule to again refer to the Wampler case. The instruction in that case was to the effect "that a party who seeks to set up a will must prove by a preponderance of evidence that the paper offered for probate is the true will of a capable testator, and that nothing short of clear and convincing evidence will suffice; and, unless the jury believe that it has been established by clear and convincing evidence that Amanda Miller was a capable testatrix at the time of the execution of the paper, * * * they must find

a verdict against the same." In disapproving this instruction the court said: "The unqualified language of this instruction, which wholly omits the presumption in favor of sanity and announces the proposition that the burden of proving testamentary capacity by clear and convincing testimony is upon the proponents, is not in harmony with the established rule on that subject, and was calculated to mislead the jury. It is true that in probate proceedings the court or jury must be satisfied, not only that the will has been executed in accordance with the statute, but also that it is the last will of a free and capable testator. Yet in general the latter is presumed when the due execution of the will is proved. 2 Min. Inst. (2d Ed.) pp. 939, 940; Wallen v. Wallen, 107 Va. 131, 57 S. E. 596. Where, however, the sanity of the testator is put in issue by the evidence of the contestant, the *onus probandi* lies upon the proponent to satisfy the court or jury that the writing propounded is the will of a capable testator. Yet, upon the trial of that issue, there is an existent presumption in favor of the testator's sanity. Indeed, of such force is that presumption in our jurisprudence that though one be on trial for a felony, involving life or liberty, when the defense of insanity is relied on, it must be proved to the satisfaction of the jury."

## NOTES OF IMPORTANT DECISIONS.

**NEW TRIAL—RIGHT TO COMPEL LOSING PARTY TO PAY JUDGMENT, WHEN REMITTITUR IS OFFERED, OR REFUSE A NEW TRIAL.**—A novel proceeding in passing on a motion for a new trial came up in the recent case of Hall v. Northwestern Ry. Co. (S. C.), 62 S. E. 848. Plaintiff secured a judgment for $15,000, which defendant, in his motion for a new trial alleged to be "excessive." The trial court agreed to this contention, and declared he would order a remittitur of $5,000 provided defendant would tender $10,000 to plaintiff in court within twenty-four hours; otherwise he would overrule the motion for new trial. This the defendant refused to do, and appeal from this action of the court as error. The court on appeal held that such a procedure was without any warrant of authority, holding that the trial court, having decided that the verdict was excessive, and ordering a remittitur could not go further and attach conditions upon the defendant's rights to the benefits of such judgment, or shut off any right of appeal that he may have.

The court in the course of an interesting opinion, has the following to say on this point: "It is true the order for a new trial was a benefit bestowed upon the defendant, but it was a benefit to which he was entitled, not by grace, but by right, as soon as the verdict was adjudged excessive, and it cannot be made a condition of the enjoyment of this right that he shall surrender his other right to appeal to the supreme court on the ground of error committed in the course of the trial. The principle we have stated is well supported by authority. As was well said by the Supreme Court of California in a very similar case, it was not the fault of the defendant that the jury found an excessive and unjust verdict, and the defendant should not be punished for it by being deprived of his right of appeal. Gardner v. Tatum, 81 Cal. 370, 22 Pac. 880. While the precise point was not involved, the opinion of the court in Kennon v. Gilmer, 131 U. S. 22, 9 Sup. Ct. 696, 33 L. Ed. 110, seems to accord with this conclusion. In Schultz v. C., M. & St. P. R. Co., 48 Wis. 375, 4 N. W. 399, in discussing an order like this, the court said: "The court may grant or refuse a new trial, or, in a proper case, may grant a new trial nisi; but should do one thing or the other. It should not, as was done in this case, require the prevailing party to remit a portion of the damages awarded, and then deprive the other party of the benefit of the reduction unless he submits to onerous terms. Had this defendant paid the $3,000 and costs, and taken a discharge of the judgment, probably it would thereby have lost the right to have the case reviewed by this court on appeal." In Young v. Cowden, 98 Tenn. 577, 40 S. W. 1091, it is said the defendant cannot be required to forego his appeal by the terms of an order for new trial. We have examined the authorities cited by respondent's counsel and many others, but we have found no case where a court of last resort has sustained such a condition as was here attached to the order for a new trial. The order of Judge Prince is adjudged to be erroneous in imposing the condition that the defendant should tender the reduced amount within 30 days from the date of the order. The substantial effect is to modify the order so that the defendant is adjudged to be entitled to a new trial, unless the plaintiff shall within 30

days from the filing of the remittitur in the court of common pleas for Kershaw county remit by due entry on the record the sum of $5,000. Upon such entry being so made, it is adjudged that the judgment of the circuit court be affirmed."

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CARRIERS—NEGLIGENCE IN STARTING TRAIN WITHOUT WARNING PASSENGERS WHO MAY HAVE TEMPORARILY LEFT THE CAR.—There is no doubt that a passenger who descends from a train for the purpose of exercise and relief from the fatigue of travel while the train stopped intending to resume his journey, continues while so temporarily on the station platform to be a passenger. But the recent case of Gannon v. Chicago, Rock Island & Pacific Ry. Co. (Iowa), 117 N. W. 966, goes further and holds that a carrier which, with knowledge that a passenger temporarily on the station platform for rest and exercise during a stop intends to continue his journey, starts the train without reasonable warning and opportunity for the passenger to safely re-enter the car, is negligent, and liable for the natural consequences of such negligence, unless the passenger has contributed to his injuries.

The court's opinion on this point is not without value. The court said: "Deceased continued to be a passenger while temporarily on the station platform, intending to continue his journey on the train, having descended from the train for a temporary and proper purpose, that of exercise and relief from the fatigue of travel while the train should be stopped. Parsons v. New York C. & H. R. R. Co., 113 N. Y. 355, 21 N. E. 145, 3 L. R. A. 683, 10 Am. St. Rep. 441; Dodge v. Boston & Bangor Steamer Co., 148 Mass. 207, 19 N. E. 373, 2 L. R. A. 83, 12 Am. St. Rep. 541. 'We think the weight of authority, reason, and custom all require us to hold that where a passenger, without objection by the company or its agents, alights at an intermediate station, which is a station for the discharge and reception of passengers, for any reasonable and usual purpose, like that of refreshment, of sending or receipt of telegrams, or of exercise by walking up and down the platform, or the like, he does not cease to be a passenger, and is justified in the belief that the company is exercising due care for his safety.' Alabama G. S. R. Co. v. Coggins, 88 Fed. 455, 458, 32 C. C. A. 1. If with knowledge that the passenger thus on the platform is intending to continue his journey on the train it is started without reasonable warning and opportunity for him to safely re-enter the car, the carrier is negligent in performing its contract of transportation, and is liable for the natural consequences of such negligence, unless the passenger has contributed to his injuries so as to defeat his right of recovery."

In this case it was further held that it was not negligence for a passenger in such a predicament to run for the train and attempt to board it while moving with the aid of a Pullman porter, the court holding that a Pullman porter is an agent for the carrier at least for the purpose of assisting passengers to alight from and board cars in transit.

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SUNDAY—TO INVALIDATE CONTRACTS MADE ON SUNDAY BOTH PARTIES MUST INTEND THE CONTRACT SHALL BE CONSUMMATED ON THAT DAY. — The recent case of Collins v. Collins (Iowa), 117 N. W. 1089, makes an important distinction in respect to contracts which are void because made on Sunday, holding that to defeat recovery on a note executed on Sunday, it must appear that both the maker and payee were parties to the illegal transaction. The court states the case and the distinction clearly in its opinion. The court said: "The finding of fact that the note of September 6, 1904, was signed on Sunday necessarily carries with it the conclusion that it was mailed to Caleb Collins on the same day; and, if it was the intention of both the maker and the payee of the note that such mailing should constitute a delivery, the transaction would fall within the rule of Tharp v. Thero, 112 Iowa, 573, 84 N. W. 709. But this case is not controlling, for the reason that the evidence almost conclusively shows that Caleb Collins did not know that the note was in fact executed on Sunday, and did not intend that it should be so executed. If this be true, it can make no difference with the plaintiff's right to recover whether the defendant signed the note and delivered it in the mail on the date he claims he did or not. A note executed on Sunday, in violation of the provisions of Code, § 5040, is not absolutely void, but is voidable only. The ground upon which courts refuse to entertain actions on contracts made in contravention of Sunday statutes is because one who has participated in a violation of law cannot be permitted to assert in a court of justice any right founded upon or growing out of the illegal transaction. Johns v. Bailey, 45 Iowa, 241. And although a note made be executed on Sunday, it may still be enforced, unless it be shown that the payee was a party to the illegal transaction. In other words, to defeat recovery on such a note, it must be shown that both the maker and the payee were parties to the illegal contract. In Johns v. Bailey, supra, we said,

speaking of a Sunday contract: 'If the assignee took no part in the inception of the contract, and had no notice of its turpitude, he did not violate the law forbidding the execution of the instrument. He is not particeps criminis with the obligor. The rule "ex turpi causa non orator actio" will not avail to protect a wrongdoer against an innocent party whose rights have been acquired without notice of the violation of law. * * * The courts will afford relief where parties to an illegal contract are not in pari delicto. * * * In order to defeat a contract made, on Sunday, it must be shown that the party seeking to enforce it had some voluntary agency in consummating the contract on that day. Sargeant v. Butts, 21 Vt. 99.' See generally in support of this conclusion the Johns Case, Davidson v. Carter, 55 Iowa, 117, 7 N. W. 466, Leightman v. Kadetska et al., 58 Iowa, 676, 12 N. W. 736, 43 Am. Rep. 129."

## REGISTRATION AS AFFORDING CONSTRUCTIVE NOTICE OF CONTENTS OF DEEDS.

The Federal Circuit Court, in 1894, in Hudson v. Randolph,[1] held that in Texas, filing a deed for registration is constructive notice of the contents of the deed, whether recorded or not. The court reviewed Throckmorton v. Price,[2] Taylor v. Harrison,[3] and many other Texas cases, and held as Throckmorton v. Price had not been overruled, that it should be followed as the best authority on the issue. Judge Moore, in 1866, delivered the opinion in Throckmorton v. Price, and the same Judge in 1877, wrote the opinion in Taylor v. Harrison, without reference to or citing the former opinion of the same court, and held that a purchaser can act on the title as shown by the face of the record.

Chancellor Kent says: "Adjudged cases become precedents for future cases resting upon analogous facts, and brought within the same reason."[4] In the case of Throckmorton v. Price, a deed of trust was filed for record December 20, 1858. In February, 1859, after inquiry of the clerk and failure to find any deed to, or incumbrance on the land, it was bought, paid for, deed taken at once and filed for record. The case was decided on the statute, providing that an instrument filed for record shall be considered as recorded from the time it is deposited for record with the clerk.[5] In the opinion it is said: "Registration laws of a general similarity to ours have been enacted in most of the other states, yet we have been able to find no case in which the first deed has been postponed in favor of the second for the failure of the clerk to record the prior deed as directed by the statute, while the contrary has been frequently decided."[6] And in Connecticut it is said, "if a deed after it has been received and entered for record, remains unrecorded, through no fault of the grantee, until an attachment of said land, it shall not prejudice the grantee."[7] "The same principle is also recognized in Alabama."[8] Eleven years later Taylor v. Harrison was decided. The deed in question was filed and indexed January 22, 1846, and the same day recorded except the acknowledgment, which was omitted. Notwithstanding the statute relied on in Throckmorton v. Price, and the ruling in that case, that the grantee can not be held liable for failure of the clerk to record the deed filed by him, and that a filed unrecorded deed is notice under the statute, yet by the decision of Taylor v. Harrison, if the clerk omits the acknowledgment in recording, "the record will only give notice of the existence of such an instrument as that exhibited by it."[9] Therefore, if no attempt had been made to record the deed, its filing would have been notice, but an erroneous

(1) 66 Fed. 216, 13 C. C. A. 402.
(2) 28 Tex. 605.
(3) 47 Tex. 454.
(4) Vol. I, p. 473, cited in Storrie v. Cortes, 90 Tex. 291.
(5) Oldham & White's Dig. Art. 1709; Sayles Civ. Stat. Art. 4607.
(6) Citing, Bank of Kentucky v. Hagegan, 1 A. K. Marsh. 306.
(7) Citing, Franklin v. Cannon, 1 Root; Hastmyer v. Gates, 1 Id. 61; McDonald v. Leach, Kirby, p. 72; Judd v. Woodruff, 2 Root, 298.
(8) Citing, McGregor v. Hill, 3 Stew. & Post, 397.
(9) Citing, Terrell v. Andrew County, 44 Mo. 309; Beckman v. Frost, 18 Johns. 544; Sanger v. Craigne, 10 Vt. 555; Jennings v. Wood, 20 Ohio, 266; 2 Wash. Real Prop. 139.

record, deprives the deed though duly filed of notice except as stated. Argument is not required to show that these two cases are in conflict, and that a statutory provision was the remedy.

In 1898, the case of Dean v. Gibson was decided by the Texas Court of Civil Appeals,[10] Judge Stevens delivering the opinion, applies the law of *stare decisis* to the case of Throckmorton v. Price, and the case of Taylor v. Harrison. This learned judge says that the statute in force when these cases were decided,[11] had been re-adopted without material change, which gives construction the force of law. In this decision, the court fails to take notice of the very material change made by the commissioners in revising the Civil Statutes, which took effect in 1879, two years subsequent to the decision in Taylor v. Harrison. The revisers of our laws, placed in our statutes an article[12] directly in line with the decision of Taylor v. Harrison, and adverse to the decision of Throckmorton v. Price. This shows that the commission's article, was intended to settle the conflict of the two decisions. The report of the commissioners embodied this article as a *"necessary improvement to* the present laws."[13] This article was adopted as part of our statute law and took effect September 1st, 1879,[14] as follows: *"Record of any grant,* etc. When notice. The record of any grant, deed or instrument of writing authorized or required to be recorded, which shall have been duly proven up or acknowledged for record *and duly recorded* in the proper county shall be taken and held as notice to all persons of the existence of such grant, deed or instrument."[15] The final title of the report of the commissioners[16] provides, "that the revised statutes were substantially the same as the law now in force, shall not be construed as repealing the latter, or as new enactments thereof, but merely as a continuance of them."[17] "Title 59—Laws,"[18] Chapter 4, Construction of Laws, "is an addition which is believed to be necessary." It is provided:[19] "In all interpretations the court shall look diligently for the intention of the legislature, keeping in view at all times, the old law, the evil, and the remedy." The case of Laughlin v. Tipps,[20] approves Taylor v. Harrison. The court in this case says: "Purchasers are only charged with constructive notice of the facts actually exhibited by the record, and not with such as might have been ascertained by such inquiries as an examination of the record might have induced a prudent man to make."[21]

The Supreme Court of Texas in Holmes v. Johns,[22] quotes from Judge Green in McCulloch v. Eudaly:[23] "The registry acts are intended for the protection of the community from imposition and frauds. If a purchaser who is not in possession of the land, may keep his deed in his pocket for ten years, concealed from the world, and then produce it, and overreach all other deeds, which in the meantime may have been made for the same land, no man would be safe in the purchase of an estate." The case of Weber v. Moss,[24] quotes with approval at length from Taylor v. Harrison, and cases there cited.[25] Devlin on Deeds, 3rd

(10) 48 S. W. 57; Second Appeal, 34 Civ. App. 508, 58 S. W. 51.

(11) 1866, and 1877.

(12) Art. 4342, Sayles Rev. Civ. Stat.; Art. 4652, ed. of 1897.

(13) Report p. 732; Vol. 2 Sayles Civil Stat. 1st ed. Title 86.

(14) Vol. 2, 1st ed. p. 673.

(15) Art. 4342, Sayles Rev. Civ. Stat.; Art. 4652, ed. of 1897. Italics mine.

(16) General Provisions, Sec. 19, p. 739.

(17) Adams v. Railway, 70 Tex. (1888) 270.

(18) p. 728.

(19) Revised Stat. Art. 3138, Sec. 6.

(20) 8 Tex. Civ. App. (1894) 653.

(21) Citing Taylor v. Harrison; McLouth v. Hurt, 51 Tex. 120; Dean v. Gibson, 34 Tex. Civ. App. 509, 79 S. W. 363, and approved by Texas Supreme Court in refusing writ of error, 48 S. W. 58 (1898), 58 S. W. 5 (1900); Neyland v. Lumber Co., 26 Tex. Civ. App. 421 (1901), 64 S. W. 698; Hart v. Patterson, 17 Tex. Civ. App. 593 (1897), 43 S. W. 546; Saunders v. Hartwell, 61 Tex. 688 (1884); Spence v. Brown, 22 S. W. 984 (1893); Fordtran v. Perry, 60 S. W. 1002 (1901) Holmes v. Johns, 56 Tex. 52, 53 (1881).

(22) 56 Tex. 52, 53.

(23) 3 Yerg. 348.

(24) 3 Tex. Civ. App. 18, 19, (1893).

(25) Terrell v. Andrew County, 44 Mo. 309; Beekman v. Frost, 18 Johns. 544; Singer v. Craigne, 10 Vt. 555; Jennings v. Wood, 20 Ohio, 266; 2 Wash. Real Prop. p. 139; Devlin on Deeds, Sec. 683.

Ed. cites Taylor v. Harrison with numerous others, giving the text as follows: "The doctrine announced by the courts is, that the records are only notice of what they contain, and that if a deed has been filed for record, but incorrectly copied, the grantee filing the deed must suffer for any error contained in the record, rather than an innocent purchaser, who has parted with value in the belief that the records truly disclosed all the rights of *others*. The courts that declare this rule, while admitting for the most part that the record of a deed becomes effective from the time that a deed is filed with the recording officer for registration, draw a distinction in cases where after filing the deed its contents are not correctly spread upon the record. They hold that the purchaser is not bound to enter into a long and laborious search into the original papers to ascertain whether the recorder has faithfully performed his duty or not. They consider that the obligation of giving notice is placed upon the person who holds the title, and that he, and not an innocent purchaser, must suffer the consequences of an imperfect performance of this duty." There are other cases asserting the same principle of Taylor v. Harrison without citing that case, viz: McLouth v. Hurt.[26] In this case the deed of trust had been duly filed for record, but in recording, part of a lot was omitted, and as to this Judge Gould said: "Registration is constructive notice only of what appears on the face of the deed as registered." This case is cited with approval in Saunders v. Hartwell,[27] quoting from Judge Gould as *supra*.[28] McLouth v. Hurt, approved in Graham v. Hawkins.[29] Sayles Revised Civil Statutes of 1897, gives Article 4607, in the first edition of that Digest Article 4299, copied p. 212 in case of Hudson v. Randolph, Federal Circuit Court, *supra*. This is Article 5014 of Paschals Texas Digest, Section 14 of Act of May 12, 1846, and cited at p. 609 of Throckmorton v. Price, *supra*. It provides that an instrument shall be considered as recorded from the time it is deposited for record, the recorder to show in his certificate the hour, day, month and year it is recorded, and deliver when recorded to the party entitled thereto, or to his order. The court in Hudson v. Randolph,[30] copies Article 4334,[31] providing that any such instrument for record, proven, etc., as required by law, shall be valid as to subsequent purchasers for a valuable consideration without notice, and to all creditors, from the time the instrument is acknowledged, proven or certified, and delivered to the clerk to be recorded. In 1895, the next year after the case of Hudson v. Randolph was decided, this article was amended to read:[32] "Every conveyance, covenant, agreement, deed, deed of trust or mortgage in this chapter mentioned, or certified copies of any such original conveyance, covenant, agreement, deed, deed of trust, or mortgage copied from the deed or mortgage records of any county in the state where the same has been regularly recorded, although the land mentioned may not have been situated in the county where such instrument was recorded, and which shall have been acknowledged, proven or certified according to law, may be recorded in the county where the land lies, and when delivered to the clerk of the proper court to be recorded shall take effect and be valid as to all subsequent purchasers for a valuable consideration without notice, and as to all creditors from the time when such instrument shall have been so acknowledged, proven or certified and delivered to such clerk to be recorded, and from that time only; provided, however, that all certified copies filed and recorded under the provisions of this article shall take effect and be in force from the time such certified copy was filed for record; and provided further, that nothing

(26) 51 Tex. 120 (1879).

(27) 61 Tex. 688.

(28) Judge Gould cites to sustain McLouth v. Hurt, 51 Tex. 120; Nelson v. Wade, 21 Iowa, 52; Lally v. Holland, 1 Swan. 411; Baldwin v. Marshall, 2 Hump. 116; Frost v. Beckman, 1 John. Ch. 299; Lessee of Jennings v. Wood, 20 Ohio, 266.

(29) 1 Posey's Tex. Unreported Cases 519.

(30) p. 219.

(31) Act of Feb. 5, 1840, Pas. Dig. Art. 2994.

(32) Sayles Texas Rev. Civil Statutes Art. 4642.

in this (article) shall be construed to make valid any instrument which was, at the time of its execution, invalid."[33]

It will be seen that the old law was recast and amended evidently to admit in evidence certified copies of instruments recorded in counties other than where the land affected was situated, as article 4641, old article 4333, did not allow this. The amended article of the commission of revision was the law of Texas when Hudson v. Randolph was decided, but it is not cited or in any way referred to in the opinion of the court. The Texas cases citing that article,[34] hold that this statute does not change the decisions as to constructive notice by registration, requiring that a purchaser to be affected with notice, his grantor must be in the chain of title. It is said in the first case that this article of the statute adds nothing to the law as it previously existed; but by this is meant the question of notice as confined to the chain of title. The history of the article is not gone into in any way. This article does not state, "when filed for record," but "authorized, or required to be recorded, which shall have been duly proven up or acknowledged for record, and duly recorded in the proper county, shall be taken and held as notice to all persons"—(in the chain of title, is the court's construction) "of the existence of such grant, deed or instrument." "And duly recorded" is not "substantially the same" as the old law; it takes the place of "when filed for record."

*Equitable Estoppel* may exist by negligence or passive conduct—silence on the part of the grantee when it is his duty to speak,[35] as where a grantee for a great length of time holds his deed which has been recorded in the name of another as vendee. The editor of Lawyers' Reports Annotated,[36] states: "The cases are not numerous in which the question of estoppel has turned simply on the fact that the record title was in one person, while the beneficial title was in another.[37] Under "Sale by record owner,"[38] it is said: There seems to be no question, that if the one having the record title, sells the land to a stranger, who pays the purchase money to him, without notice of the claim of the true owner the purchaser will acquire a good title.[39] It is not necessary to an equitable estoppel that the party should design to mislead. If his act was calculated to mislead, and actually has misled another, acting upon it in good faith, and exercising reasonable care and diligence under all circumstances, it is enough.[40] Acquiescence in a forged deed duly registered for 13 years, estops a party to assert a claim to the land against a party who purchased in good faith in ignorance of the claim of the true owner.[41] Actual fraudulent intent is not essential.[42]

I believe the following propositions are correct:

(1) In Texas since the taking effect of the Revised Civil Statutes, Sept. 1, 1879, constructive notice of a deed by registration, dates from the time the deed is recorded, and not from the time of filing it for registration. The Commission's Article 4342, so expressly provides, thus giving effect to the ruling of Taylor v. Harrison prior to the adoption of the Revised Civil Statutes.

(2) A deed recorded in the proper volume of the records, where the recorder in transcribing it gives the vendee a different name, from that in the deed, the original instrument withdrawn from file and withheld for thirty years by those claiming,

(33) Acts 1895, p. 157.

(34) White v. McGregor, 92 Tex. 557, 558; McCoy v. Cunningham, 27 Tex. Civ. App. 478.

(35) Simkin's Equity, 397, and cases cited.

(36) Note to Breeze v. Brooks, Vol. 22, p. 256, and authorities cited.

(37) Note b.

(38) Note c.

(39) Note d. and authorities cited.

(40) Bank v. Hazard, 30 N. Y. App. 30, Vol. 6 Pars. ed. p. 730 and Note a for cited cases.

(41) Wampol v. Kountz, 14 S. Dak. 334, 85 N. W. 396, 86 Am. St. Rep. 765, and note p. 769; Pom. Eq. Jur. pp. 802, 804; 9 Ballard's Real Prop. Sec. 251; 63 Am. St. Rep. 167; 138 U. S. 486; 34 L. Ed. 1032; Alexander v. Woodford (Ky.), 14 S. W. 80.

(42) Stevens v. Ludlum, 46 Minn. 160, 24 Am. St. Rep. 210, 48 N. W. 771; Marmes v. Goblet, 31 S. C. 153, 17 Am. St. Rep. 22; Linsey v. Cooper, 94 Ala. 170, 33 Am. St. Rep. 105; Gjerstanengen v. Hartwell, 9 N. D. 268, 81 Am. St. Rep. 575, 83 N. W. Rep. 230; Smith v. Sprague, 119, Mich. 148, 75 Am. St. Rep. 384, 77 N. W. 689.

by or through the grantee shown by the deed, and no attempt made to correct the record, during which time possession was not taken or any active ownership asserted under the deed, by or through the grantee shown by it, and a third party after this lapse of time for a valuable consideration, purchased from or through the grantee shown by the record, and claiming the land, without notice of claim to the land by or through the grantee shown by the deed, such purchaser takes a good title by estoppel.

JAMES E. HILL.

Livingston, Texas.

## NEW TRIAL AS REMEDY TO CORRECT ERROR.

### CERNEY v. PAXTON & GALLAGHER CO.

Supreme Court of Nebraska, Dec. 17, 1908.

Where a general verdict is set aside for errors occurring at the trial, no part of such verdict can be left to stand; but a new trial must be awarded upon all the issues of fact.

CALKINS, C.: This was an action to recover the value of a stock of goods mortgaged by plaintiff to defendant, on the ground that the mortgage was obtained by a promise that the defendant would see that the goods brought upon sale a certain price, which promise the defendant fraudulently and deceitfully made with the secret intention of not performing it. The first trial resulted in a verdict and judgment for the plaintiff which was reversed by this court. 110 N. W. 882, 10 L. R. A. (N. S.) 640. The opinion by Albert C. contains a full statement of the facts, which it is necessary to repeat. The second trial upon the same issues resulted in a verdict for the defendant, and, from a judgment rendered thereon, the plaintiff now appeals.

A reference to the former opinion will disclose that, while the defendant urged numerous errors, the cause was reversed for an error of the trial judge in an instruction to the jury as to the measure of damages. The order made by this court was that the cause be remanded for further proceedings according to law. It is contended that a trial de novo was not necessary to correct said error, and that on the second trial the district court should have submitted to that jury only the question of damages, leaving the former verdict to stand in all other respects. Whatever may be the rule where a case is tried by a court which states its conclusions of law and of fact separately, or to a jury to whom is submitted special findings, the practice has been to regard the setting aside of a general verdict by a jury as necessitating a re-examination of all the questions submitted to the jury in the trial which resulted in such verdict. The statutes regulating the course of procedure do not specifically provide for setting aside a verdict in part; on the contrary, the remedy provided for errors committed during a trial, as prescribed by section 314, Code Civ. Proc., is a new trial. We think we may say it is the universal practice for a trial court, upon granting a new trial under said section, to examine all the issues of the case, and that such a practice as setting aside a verdict as to some part of the issues of fact, and submitting such part to another jury, is altogether unknown. When a case brought to this court is sought to be reversed for any of the errors which are specified in section 314, Code Civ. Proc., as ground for a new trial, the making of a motion in the district court for such new trial in the time and manner required by the statute is an essential prerequisite to the right of the party appealing to have such error considered in this court. In such cases the appeal is in effect an appeal from the order refusing a new trial. Under section 594, Code Civ. Proc., which provides that, when a judgment or final order shall be reversed either in whole or in part in the Supreme Court, the court reversing the same shall proceed to render such judgment as the court below should have rendered, or remand the cause to the court below for such judgment, it logically follows that since, when a cause is reversed for any of the errors specified in section 314, the court below should have rendered a judgment awarding a new trial, it is the duty of this court to either render the judgment granting a new trial or remand the cause to the court below for such judgment. The plaintiff cites the cases of the Missouri, K. & T. Trust Co. v. Clark, 60 Neb. 406, 83 N. W. 203, and Colby v. Foxworthy (Neb.), 110 N. W. 857; but in neither of the cases so cited was the precise question presented, nor does this case fall within the rule there laid down. Those cases and the cases cited in the majority opinion in the Missouri, K. & T. Trust Co. v. Clark, supra, are authority for the rule that after the reversal of a judgment for error occurring subsequent to the trial, and where the findings or verdict were not disturbed, there is no necessity for

a new trial; that in such a case the court should retrace its steps to the point where the first material error occurred, and from that point the trial should progress anew. We are satisfied that where the error preceded the verdict, and the verdict is a general one, there must be a new trial upon all the issues of fact. The plaintiff cites, and quotes largely from the opinion in the case of Lisbon v. Lyman, 49 N. H. 553; and it must be conceded that that case sustains the plaintiff's contention to the extent that this court should have upon the former hearing sent back the case for a new trial upon the one question of the measure of damages. The considerations urged by the writer of the opinion in that case would have carried great weight, if addressed to a legislative body having the power to take away from the verdict of the jury its omnibus character and provide for specific findings of the different issues submitted to that body. They fail, however, to convince us that such is the law; and, until the nature of the trial by jury is modified, and the character of their verdict is essentially altered we doubt the beneficent effect of any attempt of the courts to by construction change the law so as to split the verdict of the jury into component parts, and try the several issues by different juries. We therefore must adhere to the rule that where a general verdict is set aside for errors occurring at the trial, no part of such verdict can be left to stand, but a new trial must be awarded upon all the issues of fact.

We therefore recommend that the judgment of the district court be affirmed.

NOTE.—*Partial New Trials.*—The principal case, as is seen, plants itself on a supposed technicality which is greatly doubted as ever in force at common law for the last two hundred years. The leading case in this country on the subject of a new trial being limited strictly to the correction of error in a prior trial may be said to be the case of Lisbon v. Lyman, 49 N. H. 553. Each of the judges expressed himself by more than a mere concurrence, and three of them wrote very elaborately. This note cannot be made more illuminating and instructive than by a liberal extract from what was said by the chief justice. He said: "These authorities and many others illustrate the general principle that when an error has happened in a trial, the party prejudiced by it has a right to a correction of the error, but has not a right to a new trial, if the error can be otherwise corrected; and when it can be corrected only by a new trial, it is still the correction of the error, and not the new trial to which he is primarily entitled. The correction of the error is the end; the new trial is a means. There is no general rule that when there has been an error in a trial, the party prejudiced by it has a legal right to a new trial. He has a legal right to a cure of the error, but not to his choice of remedies. If a new trial is necessary, he receives it, not because it is a general right, but because it happens, in a particular case, to be the only available remedy. It is thus held in reserve as the last resort, because it is more expensive and inconvenient than other remedies; an unnecessary new trial would be an unnecessary injustice and an unmixed evil. That is the theory of the common law. And so far as a new trial goes beyond the necessity of its use, so far is it an unnecessary injustice and an unmixed evil. That is but a branch of the general theory. The general theory of the law and all its analogies, its reason and its justice, concur in the conclusion that a remedy, of whatever form, shall be administered no farther and no longer than is necessary to effect a cure of the error to which it applied. It happens in this case that the error cannot be corrected without a new trial. Therefore indirectly, secondarily and consequentially, the defendant has a legal right to a new trial. A new trial of what? Upon every ground of legal principle, strict logic, common sense and natural justice, the defendant has a legal right to nothing more than a new trial that will correct the error, the correction of which is all the defendant is entitled to; and such a new trial is of that part of the case only which contains the error. In granting a new trial of that part of the case, the defendant's right is not limited, but is maintained in its widest and fullest extent. * * * But if a new trial were granted to the defendant of questions which have been correctly tried and rightly decided, that would be an exercise of arbitrary power of which the plaintiff and the public would have reason to complain. Such an unnecessary new trial would be an unnecessary expense and burden to the plaintiff and the public. When defendant asks the court to deprive the plaintiff of the ground fairly and legally won, and to put the plaintiff to another expensive, laborious and vexatious campaign to recover the same ground a second time, it is for the defendant to show how such an extraordinary, unjust and unconscionable demand can be sustained. On the face of it, such a demand is an appeal to despotic force. A power that would indulge itself in the needless and indiscriminate destruction of those parts of a costly verdict in which there is no error, can be paralleled only by a power that would destroy an entire verdict without cause.

The weight of the decisions in other jurisdictions taken together preponderates decidedly in favor of a new trial of so much of a case only as is necessary to be retried in order to correct the errors of a former trial."

All that might be added to what is thus so eloquently and logically stated, might be to remark that the new trial remedy, going beyond what is wrong to upset what has been legally established, puts it in a class by itself. It is easily seen to be abhorrent to justice for any other remedy to be so employed and there are decisions rendered every day where courts restrict and pare down to exact justice all relief prayed for. The Lisbon case cites and quotes from common law authority to show that later development of the common law prior to our independence, repudiated the theory of a new trial *in toto*, where it was not absolutely necessary to correct error committed at the former trial. American courts, like the court in the principal case, misconceiving, as seems to me, the common law

rules have construed statutes as to power of appellate tribunals, as enlargement of the common law power and instead of giving them a liberal, have given them a restrictive, construction. Judge Rombauer, of the St. Louis Court of Appeals, in Overbeck v. Mayer, 59 Mo. App. 289, seemed not troubled by the Missouri statute in this way, for he said: "The supreme court has repeatedly held that a cause may be remanded for the retrial of specific issues only, leaving the finding on other issues in the case intact. Our practice act expressly provides for the separate trial of issues, if in the opinion of the court, separate trials are proper. Where the error in the trial relates to certain issues only, which are in no way dependent for their proper trial on certain other issues already satisfactorily tried, no satisfactory reason is perceptible why a cause may not be remanded for the trial of the issue erroneously tried and for that alone." It should be said, for clearness, that the practice act referred to did nothing more than to authorize the trial court, in advance of any trial, to separate the issues for separate trials, and the learned judge could only have instanced it to show the spirit of Missouri jurisprudence, and, it must be conceded, he did not think the statute defining the powers of appellate courts contained any language either forbidding or expressly providing for such a remand. A later case from that supreme court, Third National Bank v. Owen, 101 Mo. 558, said: "The only error we find in this record requiring a reversal is that of the court striking out defendant's plea of fraud. For that error the judgment must be reversed and the cause remanded in order that issue may be joined on that plea. If that issue shall be found for defendant, that will end the case; if found for the plaintiff, then judgment may be rendered on the report of the referee; in neither event will it be necessary to go over again the immense work that has already been done in the case and incur the additional cost thereof, when manifestly it has been so well done and has produced a correct result so far as done." But these two Missouri cases have not the vigor of pronouncement they should have had. They should have announced that the court had no right in law or justice to order anything else, if the error committed was fairly separable from what was correctly tried, as the Lisbon case holds. A litigant has as much right to the constituent things of a case, which have been properly established, as he has to any entirety thus established. In North Carolina it has been followed for nearly a hundred years as a common law principle, that partial new trials should be granted. Key v. Allen, 3 Murphy 523; Holmes v. Goodwin, 71 N. C. 306; Farmers, etc., Mfg. Co. v. Railroad, 117 N. C. 579; Tillett v. Railroad, 118 N. C. 1031. The rule there is stated to be: "Ordinarily, for an error committed during the progress of the trial in the improper rejection or admission of the evidence or in the charge to the jury, material upon any issue, the verdict is set aside for the obvious reason that it cannot be seen to what extent it may have influenced the jury upon the other findings." Burton v. Railroad, 84 N. C. 192. In Foster v. Browning, 4 R. I., 67 Am. Dec. 505, the rule of remand for restricted new trial was recognized, but the court said it "was not aware of a practice anywhere which authorizes the court to fix any terms whatever upon the party against whom the application is made, unless by way of alternative, which he must accept or endure the new trial. Certainly it was never known that the party applying could have the issues found against him opened, while those in favor of his adversary, who asked no indulgence and received none in return from the court, when it was employed merely in correcting its own error." It seems to me, however, that this announcement is not sound, for if error gives legal right to its correction, one should not be compelled to imperil what has been established properly in his favor by asking for its correction. The right to have material error corrected is an absolute right, and no terms should be imposed upon its being granted. In Georgia, one who has been called its greatest jurist, Judge Logan E. Bleckley, thought that a statute giving the supreme court power "to award such order and direction to the cause in the court below as may be consistent with the law and justice of the case," was ample authority for a restricted new trial and it was proper to confine the jury to a question of damages, though he thought the evidence showing the right to recover "was not satisfactory." The court said: "To the extent of settling the right, the verdict should stand as final and conclusive." Powell v. Railroad, 77 Ga. 192, 3 S. E. 757. This principle was again applied in Georgia R. & B. Co. v. Daniel, 89 Ga. 463, 15 S. E. 538. A late case from Rhode Island shows a statute similar to that in Georgia and a remand confined the retrial to the question of damages. Newhall v. Egans (R. I.), 68 Atl. 471. In Montana the partial new trial theory was evolved by other than statutory construction. Brunnell v. Cook, 13 Mont. 497, 34 Pac. 1015; Haggerty Bros. v. Lash, 34 Mont. 517, 87 Pac. 907. In Indiana the principle also has been applied, but not as a rule of very general force. Thus it was ruled that where two parties were sued and the judgment right as to one, but error was committed as to the other, the new trial was limited to the latter. Duckwall v. Kisner, 136 Ind. 99, 35 N. E. 699.

*When Remittitur Should be Conditioned on Partial New Trial.*—In Massachusetts it has been held that "the assessing of excessive damages is not a reason for setting aside a verdict and granting a new trial so as to open the merits of the case, but a new trial may be granted with respect to the assessment of damages only." Boyd v. Brown, 17 Pick, 461. If this principle is true, then it is not proper to exact of a plaintiff that he should remit from his recovery any part of his damages or submit to a new trial *in toto*, if the question of damages is separable from the other issues. At all events, the court should say before it requires a remittitur or a full new trial—that it appear that this question cannot be separately tried. If it could be, the exaction of an unrestricted new trial is not properly imposed. I have failed to find any case of the many, which require such remittiturs, that the alternative is a partial new trial. It would, in almost every case be a material factor in an appellee's conclusion to remit or not remit, whether the new trial is to be upon the whole case or as to a specific issue or issues. The federal supreme court expressed itself as in doubt about partial new trials in a case where it was found not necessary to decide the question. Hodges v. Easton, 106 U. S. 408, 27 L. Ed. 169.

N. C. COLLIER.

## JETSAM AND FLOTSAM.

### WAITING FOR CLIENTS TO COME.

A young lawyer in Texas, who has grown discouraged over the prospects for business, penned the following verses:

I sit in my office disconsolate,
Restless, blue and glum.
There are numerous things I ought to do
But I am waiting for clients to come.

Some folks say, "go out and get 'em,"
Inveigle them into the room;
But there's ethics in the profession
So I wait for clients to come.

The dago sella de peanuts,
Other people "maka de mun;"
But there's nothing on earth for a lawyer to do,
But wait for the clients to come.

You can be a lawyer if you want to—
But I'd a durn sighter be a bum.
And eat free lunch and drinka d'beer
Than wait for the clients to come.

## CORRESPONDENCE.

### LAISSEZ FAIRE IN THE UNITED STATES.

Editor Central Law Journal:

I have read with a great deal of interest the articles on Laissez Faire in the United States, and think the subject ought to be extended, as it is one upon which the legislators seem to have gone beyond all reason in this state. Our supreme court in State v. Redmond, known as the berth in Pullman car case, cited also in Bonnett v. Vallier, 116 N. W., known as the tenement house law, but which practically described how every building should be built, give the foundation material for an extension of that article.

I have, for instance, up, the state bakery law, which regulates bakeries and provides among other things that the floor of old bakeries must not be more than eight (8), and new bakeries, five (5) feet below the level of the sidewalk, nor in any room the ceiling of which is less than eight (8) feet high from the floor, nor a bakery re-opened in a room which has not been used for a bakery for six (6) months.

As the field is new, I believe it to be a subject upon which the article should be continued to cover all classes of business and buildings, besides other subjects within the field. No doubt, the intermediate courts have had the question up, and it would be a great aid to lawyers should you continue the subject.

Yours truly,
MORITZ WITTIG.

Milwaukee, Wis.

### A PUZZLING (?) WILL QUESTION.

Editor Central Law Journal:

Noticing in your issue of the 22d ult. the copy of a will drawn by a "country lawyer" and probated by a Fargo, N. D., city lawyer, I take the liberty to suggest that a careful reading of the will as given shows nothing calling for anybody's guess, as its wording is exceptionally apposite, its meaning clear, and its legal effect apparent.

Assuming that the statute of N. D. follows those of the great majority of the states, and makes the use of words of inheritance unnecessary in a devise to carry a fee interest, and applying the well-settled rule to the second paragraph of item third of the will, which application would refer the deaths provided against therein, to deaths occurring in the lifetime of testator, the legal effect of the provision of the will is plainly apparent. The two sons named took a fee interest in the real estate, subject to the possessory right of the mother, also subject to the payment of debts, legacies, etc.

The rule referred to is well stated in an excerpt from the opinion of the court in In Re New York, Lackawanna & Western Railway Co., 105 N. Y. 89, quoted in a note to Section 676, Page on Wills.

Judging from the article and copy of the will in your publication, whatever of mental cloudiness appears, is rather in the mind of the city lawyer who probated the will "as one of your subscribers," and not in the mind of the country lawyer who drew the will.

Most respectfully yours,
W. V. SMITH, Atty.

Flint, Mich.

### LIMITING HOURS OF WORK FOR WOMEN AND CHILDREN.

Editor Central Law Journal:

I have just read the second installment of the article entitled, "Laissez Faire in the United States," by Mr. W. A. Coutts, (68 Cent. L. J. 118). On page 120 in the paragraph entitled "Limiting Hours of Work for Women and Children," he cites, and comments on, the case of Lochner v. New York, 198 U. S. 45, as being the law. It appears to me that the author of this very interesting article has overlooked the case of Muller v. Oregon, 208 U. S. 412, 52 Law. Ed. 551, (Same case 48 Ore. 252; 85 Pac. 855), where the Federal Supreme Court held that a statute limiting the hours of work for women in factories, laundries, etc., to ten hours per day (Laws Oregon, 1903, p. 148), does not infringe the rights under the 14th amendment.

Yours very truly,
ROBERT H. DOWN.

Portland, Ore.

## BOOK REVIEWS.

### STREET RAILWAY REPORTS, VOL. IV.

Specialization is the theme of all modern movements of successful achievement in any branch of earthly endeavor The man in any business, who is not content to abide within narrow confines, will evaporate his energy in the marsh of mediocrity. Nor is the law an exception to this modern law of progress. And thus we have considerable specialization, both in the practice of law, and in legal authorship. Among the published law reports in which this principle of specialization is prominent are the Street Railway Reports, annotated. These are quite useful volumes to attorneys interested in street railway litigation as it brings to such, not only all the reports bearing upon their specialty, but competent annotations, which explain and harmonize the sometimes apparently con-

flicting authorities in the same jurisdictions. In the present volume, as far as our observation has gone, these annotations are well prepared and quite exhaustive, usually of the decisions of the jurisdiction of the court which decided the principal case.

Printed in one volume of 1,010 pages, and published by Mathew Bender & Co., Albany, N. Y.

### COSTIGAN ON MINING LAW.

No series of legal text books are so deservedly popular as the Hornbook series. Their perspicuous and acessible arrangement, the black letter text and the judicious selection of authorities, combine to make it an ideal text book both for the student and the practitioner. To our mind there is no better way to teach a student the principles of law than from a text book of this character. He makes no mistakes in attaching the proper and relative importance to the various phases and application of the principles of law he has for investigation, nor does he find these principles enveloped in a mass of irrelevant rubbish as in the case system. All the advantages of the latter system can be fully appropriated if the student will follow up his study of the text by a careful examination of the authorities cited, or that may be suggested by the instructor.

The work entitled "American Mining Law," by Hon. George P. Costigan, Jr., Dean of the College of Law of the University of Nebraska, which is one of the latest additions to the Hornbook series, is an exceptionally good text book for students, being written not only by one practically familiar with mining law and mining operations, but also an instructor of experience and ability. It is quite well settled that not every lawyer, no matter how successful as a practitioner, can write a law book or teach the young idea how to bend the legal bow. Mr. Costigan has the gift of the instructor; he has the faculty of making clear the point he is presenting, in the fewest possible words and arranges his matter so logically, so sequentially, that the student is led unconsciously into a knowledge of the principles which the author seeks to explain.

Printed in one volume of 765 pages; bound in buckram and published by the West Publishing Co., St. Paul, Minn.

## BOOKS RECEIVED.

Proceedings of the Illinois State Bar Association. Thirty-second Annual Meeting, Chicago, June 25 and 26, 1908. Edited by John F. Voigt, Secretary. Springfield: Illinois State Register Book Publishing House, 1908.

Proceedings Virginia State Bar Association. Twentieth Annual Meeting, Hot Springs, Va., Aug. 4-6, 1908. Edited by John B. Minor of the Richmond bar. Richmond, Va.: Richmond Press, 1908.

A Treatise on Guaranty Insurance and Compensated Suretyship, including the law of Fidelity, Commercial and Judicial Insurances. By Thomas Gold Frost, LL.D., of the New York bar. Second Edition, revised and enlarged. Boston: Little, Brown & Co. Price $6.00. Review will follow.

## HUMOR OF THE LAW.

A raw mountaineer got back at Judge Mose Wright, of the Rome circuit, in a very clever way, says the Atlanta Georgian. While the judge was presiding over the Chattanooga Superior Court he had occasion to plaster a $15 fine on this man because he failed to appear in time as a witness in a case.

"Say, jedge, hain't that purty steep?" mildly inquired the Chattanoogan.

"No," was the reply. "You know you were an important witness in this case and ought to have been here. I will suspend payment, however, and hold it over you to see that there is no like trouble in the future."

Later Judge Wright was spending a few weeks at Menlo, a popular summer resort in Chattanooga County, several miles from a railroad. He had a package to come out from Summerville and the big mountaineer happened to deliver it.

"Well, what do I owe you?" asked the judge, genially, reaching in his change pocket.

"Wall, jedge, I reckon about $15 would square us," was the calm reply.

"What?" yelled Judge Wright, staggering back.

"Mebbe you won't be so dern keerless next time 'bout leavin' yo' packages," was the imperturbable answer.

"Look here," whispered the perturbed jurist, "I'll just remit that $15 fine I put on you down in Summerville."

"Gid ap, Beck. That' bout squares us, jedge."

It's true, all right, because Judge Wright tells it on himself.

Alas! The world has gone awry
  Since Cousin Lillian entered college,
For she has grown so learned I
  Oft tremble at her wondrous knowledge.
Whene'er I dare to woo her now
  She frowns that I should so annoy her.
And then proclaims, with lofty brow,
  Her mission is to be a lawyer.

'Tis sad to met such crushing woes
  From eyes as blue as Scottish heather;
'Tis sad a maid with cheeks of rose
  Should have her heart bound up in leather.
'Tis sad to keep one's passion pent,
  Though Pallas' arms the Fair environ,
But worse to have her quoting Kent
  When one is fondly breathing Byron.
    —Samuel Minturn Peck, in "Cap and Bells."

We received the following from a correspondent:

Some of the jokes told in your excellent journal are doubtless true, but more probably not so. The following, however, I can vouch for as an actual occurrence in ——— county, Arkansas.

Justice of the Peace ———, was a jovial, good-natured man and always ready to do a favor to a friend. Sam Jackson was being sued in the Justice's court, but had not yet engaged a lawyer to defend him and asked the Justice to recommend a reliable lawyer for that purpose. "Take my old friend Donnegan," said the Justice. "Donnegan is a fine fellow," said Jackson, "but I do not think him a good lawyer." "Perhaps not," replied the Justice, "but he has never lost a case in this court." Donnegan was employed and was rewarded with his usual success.

## WEEKLY DIGEST.

**Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort and of all the Federal Courts.**



DIGESTS ONE SCANNELL Feb 12 .... .... .... .....

1. **Accident Insurance**—Cause of Injury.—Where insured in an accident policy was at a place where, by the terms of the policy, he was not permitted to be, insurer, to defeat a recovery, must show some causal relation between that fact and the injury.—Kirkpatrick v. Aetna Life Ins. Co., Iowa, 117 N. W. 1111.

2.——Self Inflicted Injuries.—In an action on an accident policy exempting insurer from liability for self-inflicted injuries, insurer has the burden of showing that the injuries were self-inflicted.—Kirkpatrick v. Aetna Life Ins. Co., Iowa, 117 N. W. 1111.

3. **Adoption**—Compliance With Statute.—Articles of adoption, not acknowledged, recorded, nor complying with the statutes, being insufficient to make the adoption valid, are insufficient to establish heirship in the adopting parent's property.—Lamb's Estate v. Morrow, Iowa, 117 N. W. 1118.

4. **Adverse Possession**—Color of Title.—Where a deed described the lands entered on by the purchaser, his possession was adverse, under color of title, however groundless the title.—Green v. Horn, 112 N. Y. Supp. 993.

5.——Mortgages.—While the possession of a mortgagor after foreclosure is in general that of a quasi tenant of the purchaser, it may be adverse to him, if the mortgagor claims title in himself, openly and notoriously, for the statutory period.—Bosley v. Stewart, Iowa, 117 N. W. 1103.

6. **Aliens**—Married Women.—An alien woman, married to an alien, although residing in this country and otherwise qualified, cannot become a citizen of the United States by naturalization.—In re Rionda, U. S. D. C., S. D. N. Y., 164 Fed. 368.

7. **Animals**—Personal Injuries.—In an action for injuries caused by defendant's dog attacking plaintiff's team on the highway, and causing it to run away, special findings held to show defendant not liable, either under the statute or at common law.—Miles v. Schrunk, Iowa, 117 N. W. 971.

8. **Appeal and Error**—Notice on Appeal.—Under Sess. Laws 1899, p. 79, c. 49, proof of service of a notice of appeal on a party who was not the "prevailing party" held sufficient, so as not to require a dismissal, notwithstanding it was not filed within the time limited for filing proof of service on a "prevailing party."—Sipes v. Puget Sound Electric Ry. Co., Wash., 97 Pac. 723.

9. **Associations**—Reasonableness of Rules.—An order of the board of governors of an employers' association, prohibiting members of the association from employing members of a certain union, held not unreasonable as tending to disrupt the business of the members or to restrict competition.—McCord v. Thompson-Starrett Co., 112 N. Y. Supp. 902.

10. **Attorney and Client**—Disbarment and Reinstatement.—An attorney, having been disbarred for misconduct involving criminality, held not entitled to reinstatement two years thereafter on proof of uprightness during such period.—In re Clark, 112 N. Y. Supp. 777.

11. **Bankruptcy**—Acts of Bankruptcy.—An order of a state court, appointing a receiver for a corporation on a petition charging insolvency does not constitute an act of bankruptcy, where it is made to appear by an amendment of such order that it was not based on a finding that the corporation was insolvent, as the word is defined in the bankruptcy act.—In re Golden Malt Cream Co., U. S. C. C. of App., 164 Fed. 326.

12.——Appeals.—An order of a District Court allowing a claim against an estate in bankruptcy as a general debt, but disallowing in part a claim of the creditor to priority as a lien holder, is not appealable by the creditor, nor is it subject to revision on petition under section 24b, where it depends on controverted facts.—Daudette v. Graham, U. S. C. C. of App., Ninth Circuit, 164 Fed. 311.

13.——Assumption of Contract by Receiver.—A receiver for a bankrupt, who under authority of the court assumed an executory contract made by the bankrupt, held to have succeeded to the latter's right to enforce the same and to recover damages for the failure of the other party to perform.—In re Niagara Radiator Co., U. S. D. C., N. D. N. Y., 164 Fed. 102.

14.——Contempt.—A bankrupt, who on his examination before the referee, deliberately and willfully swears falsely, or falsely denies knowledge of matters about which he is interrogated, refuses "to be examined according to law," and is guilty of contempt.—In re Gitkin, U. S. D. C., E. D. Pa., 164 Fed. 71.

15.——Conversion.—A bankrupt held guilty of a willful conversion of claimant's securities, from which liability his discharge in bankruptcy would not be a release, so that he was not entitled to vacation of an order of arrest in plaintiff's action for conversion.—Kavanaugh v. McIntyre, 112 N. Y. Supp. 987.

16.——Preferences.—Where a voidable preference was made by a bankrupt to mother of creditor, who paid the consideration, which was applied to the bankrupt's account, a bill setting aside a conveyance brought by the trustee of the bankrupt will be sustained as against the

mother and a third person, to whom she conveyed after suit brought.—Brewster v. Goff, U. S. D. C., M. D. Pa., 164 Fed. 127.

17.——Provable Claims.—When a creditor of a bankrupt participates in a scheme to defraud other creditors, and in furtherance thereof advances money or incurs expense, the entire transaction is contaminated by the fraud, and the court will not assist the conspirators by allowing claims for such advances against the estate.—In re Friedman, U. S. D. C., E. D. Wis., 164 Fed. 131.

18. **Bastards**—Nature of Proceedings.—A bastardy proceeding is purely statutory, and is neither a criminal nor a civil proceeding in the general sense of those terms, but has characteristics of both.—Goyke v. State, Wis., 117 N. W. 1027.

19. **Benefit Societies**—Reinstatement of Member.—A fraternal association member's reinstatement was not vitiated by his failure to pay a rate for the current month, where he had the whole month in which to pay it and such payment was not required by the rules as a condition for reinstatement.—Lounsbury v. Knights of the Maccabees of the World, 112 N. Y. Supp. 421.

20. **Bills and Notes**—Bona Fide Purchasers.—A purchaser of a note, fraudulent in its inception, held required to show that he used the means that an ordinarily prudent man would have used to ascertain the manner in which the note was obtained from the makers.—Mee v. Carlson, S. D., 117 N. W. 1033.

21.——Extension of Time.—Extension of time to a debtor by his creditor is a sufficient consideration for a note executed by a third person, if there was an express or implied agreement for such extension.—Zimbleman & Otis v. Finnegan, Iowa, 118 N. W. 372.

22.——Nature of Instrument.—If an instrument calling for a payment was a chattel, the drawer's responsibility ended with its delivery.—Moy Sie Tighe v. Fargo, 112 N. Y. Supp. 927.

23.——Presentation for Payment.—Under Negotiable Instruments Law, Sec. 134, requiring the instrument to be exhibited to the one from whom payment is demanded, upon presentation and demand of payment of a note by one holding it for collection, the maker could insist on the exhibition of the note as evidence of the holder's right to collect.—Gilpin v. Savage, 112 N. Y. Supp. 802.

24. **Boundaries**—Description.—The presumption is that all grants are made with reference to an actual view of the premises, and courses and distances and quantities must yield to natural or artificial monuments.—Green v. Horn, 112 N. Y. Supp. 993.

25. **Breach of Marriage Promise**—Syphilis as a Defense.—A person may legally decline to carry out his promise of marriage to one afflicted with incurable syphilis, unless such promise was made with knowledge of such condition.—Beans v. Denny, Iowa, 117 N. W. 1091.

26. **Carriers**—Alighting Passengers.—That a passenger in a street car was injured by alighting before the car stopped did not of itself constitute a prima facie case of negligence on the part of the carrier.—Armstrong v. Portland Ry. Co., Or., 97 Pac. 715.

27.——Overcharges.—On a counterclaim by an interstate shipper for overcharges, the burden was on him to prove that the lesser rate was the appropriate rate applicable to the shipment and that it had been published and filed under Interstate Commerce Act Feb. 4 1887, c. 104, 24 Stat. 379, U. S. Comp. St. 1907, p. 3153.—Baltimore & O. R. Co. v. La Due, 112 N. Y. Supp. 964.

28. **Citizens**—Duties of Citizens.—The citizenship of grand jurors held established by the admission in evidence of the judgments of naturalization, and by a showing of their exercise of the rights and duties of citizenship.—People v. Quijada Cal., 97 Pac. 689.

29. **Clerks of Courts**—Money Received in Official Capacity.—An action will not lie against the clerk of a federal court in his official capacity to recover money received by him in such capacity and which passed into the registry of the court.—Hills v. Valentine, U. S. C. C. of App., Ninth Circuit, 164 Fed. 328.

30. **Commerce**—Regulation.—Railroads engaged in interstate commerce are subjects of such commerce, national in their character, and the power of Congress over the same is exclusive and may be exercised to the utmost extent, and the sovereignty of Congress, though limited to specific objects, is plenary as to such objects.—United States v. Southern Ry. Co., U. S. D. C., N. D. Ala., 164 Fed. 347.

31. **Conspiracy**—Actionable Combination.—A mere tacit understanding between conspirators to work to a common purpose is sufficient to constitute a guilty actionable combination.—In re Friedman, U. S. D. C., E. D. Wis., 164 Fed. 131.

32. **Constitutional Law**—Delegation of Legislative Power.—Legislative power cannot be delegated to an administrative officer, but a law may be passed to go into effect, or be suspended, on the ascertainment of certain facts by an administrative officer or board.—Village of Little Chute v. Van Camp, Wis., 117 N. W. 1012.

33. **Contracts**—Performance.—Where a contractor agreed to complete work within a certain time, the other party might protest against the delay, and still claim damages for breach of agreement to complete the work within that time.—Traut-Ditmar Const. Co. v. Hartman, 112 N. Y. Supp. 919.

34. **Corporations**—Corporate Powers.—An agreement by a corporation to enter an employers' association organized to facilitate the business in which the corporation and other members of the association were engaged, and to prevent labor disputes between its members and their employees, was not beyond the corporate powers.—McCord v. Thompson-Starrett Co., 112 N. Y. Supp. 902.

35.——Service of Summons.—Part of the business out of which the cause of action against the corporation arose having been transacted within this state while the corporation held a license to do business herein, service of summons upon the Assistant Secretary of State was sufficient.—Paulus v. Hart-Parr Co., Wis., 118 N. W. 248.

36. **Costs**—Attorney's Fees.—Attorney fees are not taxable as costs against the adverse party, except by express statutory provision.—Jones v. School Board of Liberty Tp., Iowa, 118 N. W. 265.

37.——Liability of Appellant.—An unsuccessful appellant is not chargeable with the cost of printing pages of an amended abstract filed by appellee, containing testimony on an issue not involved in the appeal.—Collins v. Collins, Iowa, 117 N. W. 1089.

38. **Courts**—Restraining Actions in Other State.—When the question at issue can be more decisively determined in an action in New York

than in one in an adjoining state, the further prosecution of the later action will be enjoined. —Guaranty Trust Co. of New York v. Edison United Phonograph Co., 112 N. Y. Supp. 929.

39.——Revisable Orders.—A motion by the executrix of a person deceased to abate a judgment entered against him in a criminal action in his lifetime because of his death after it was entered is an independent proceeding of a civil nature, and the order or judgment therein may be reviewed on error by the United States. —United States v. New York Cent. & H. R. R. Co., U. S. C. C. of App., Second Circuit, 164 Fed. 324.

40.——Scope of Supreme Court.—Judicial authority of Supreme Court held to extend to the review and correction of all proceedings of all inferior courts, except where excluded by statute.—Schmuck v. Hartman, Pa., 70 Atl. 109.

41. **Covenants**—Railroad Right of Way.—Covenant by a railroad company acquiring a right of way to issue to the grantor passes held a personal covenant, which ceased when the company ceased to own and operate the railroad.—Munro v. Syracuse, L. S. & N. R. Co., 112 N. Y. Supp. 938.

42. **Criminal Trial**—Evidence.—A person accused of a crime, in the commission of which a corrupt intent is a necessary ingredient, may testify what his intent was in doing certain acts. —State v. Johnson, N. D., 118 N. W. 230.

43.——Withdrawal of Plea.—A request for leave to withdraw a plea of not guilty and file a plea in abatement is addressed to the discretion of the trial court.—Ingraham v. State, Neb., 118 N. W. 320.

44. **Customs and Usages**—Interpretation of Contract.—A party desiring to offer evidence of a custom or usage to affect the interpretation of a contract must plead it.—Farmers' & Merchants' Bank of Ireton v. Wood Bros. & Co., Iowa, 118 N. W. 282.

45.——Sight Draft Against Papers.—Under Code Civ. Proc. Sec. 1870, subd. 12, evidence of commercial usage held admissible to show that a sale "sight draft against papers" means payment on presentation of shipping papers showing shipment.—Ellsworth v. Knowles, Cal., 97 Pac. 690.

46. **Damages**—Penalties.—The test of enforceability of a provision for payment of a certain amount described either as penalty or liquidated damages, is the intent of the parties, ascertainable from the contract itself and all the evidence before the court bearing upon the fairness of the stipulation.—Traut-Ditmar Const. Co. v. Hartman, 112 N. Y. Supp. 919.

47. **Deeds**—Conditions.—A factory owner, who agreed to operate his plant for ten years in consideration of conveyance of site, held not absolved from operating it for that time because of its destruction by fire, so that, on failure to do so, the title to the site reverted to grantors.—Fowler v. Coates, 112 N. Y. Supp. 849.

48.——Conditions Subsequent.—A conveyance upon condition subsequent passes title, with all rights annexed thereto subject to defeat for breach of the condition; affirmative action by the grantor being necessary to defeat the title conveyed.—Lamb's Estate v. Morrow, Iowa, 117 N. W. 1118.

49.——Suit To Set Aside.—In a suit by heirs to set aside a deed executed by their ancestor, the age of the ancestor and his physical infirmities may be considered in determining whether he was unduly influenced.—Semper v. Englehart, Iowa, 118 N. W. 318.

50. **Depositions**—Deposition of Opposing Party.—A party having taken the deposition of an opposing party may read portions thereof, leaving it to the other to introduce the remainder at his election.—Farmers' & Merchants' Bank of Ireton v. Wood Bros. & Co., Iowa, 118 N. W. 282.

51. **Divorce**—Desertion.—A spouse not at fault need not solicit the return of the other who has left the home without good cause.—Seeds v. Seeds, Iowa, 117 N. W. 1069.

52. **Elections**—Official Ballot.—As from the fact that the state has assumed to provide an official ballot, it must resort to some process of selection of candidates, the only limitation that can be put thereon is that the process adopted must be reasonable.—State v. Nichols, Wash., 97 Pac. 728.

53. **Eminent Domain**—Assessment by Commissioners.—A city is entitled to a speedy termination of its proceedings to acquire property for a public improvement, and the commissioners cannot unnecessarily prolong them to provide an excuse for fees.—In re Riverside Drive and Parkway, 112 N. Y. Supp. 869.

54.——Construction of Statute.—In the eminent domain statute of Oregon, which authorizes certain classes of public service corporations to condemn land for their use, the word "land" is comprehensive, and includes any interest in land, and under it an easement or right of way may be condemned.—Pacific Postal Telegraph-Cable Co. v. Oregon & C. R. Co., U. S. C. C., D. Oregon, 163 Fed. 967.

55. **Equity**—Prayer for Relief.—A prayer for general equitable relief is as broad as the powers of the court.—Converse v. Incorporated Town of Deep River, Iowa, 117 N. W. 1078.

56. **Estoppel**—Deeds.—Where a grantor conveys without consideration and the grantee without consideration and as a part of the same transaction reconveys, the first grantee is not invested with any title inuring to the benefit of one to whom he has before conveyed the same land by mortgage deed of warranty.—Haslam v. Jordan, Me., 70 Atl. 1066.

57. **Evidence**—Expert Testimony.—An expert medical witness may give an opinion as to the cause of a person's physical condition, based on the assumption that the evidence is true.—Crozier v. Minneapolis St. Ry. Co., Minn., 118 N. W. 256.

58.——Presumptions of Fact.—Presumptions of fact are but inferences drawn from other facts and circumstances in the case, and should be made upon the common principles of induction. —Dietrich v. Dietrich, 112 N. Y. Supp. 968.

59. **Execution**—Issue of Second Execution.—Statement of right, under Code Civ. Proc. Secs. 1375, 1377, of personal representatives of a judgment creditor to issue a second execution.—Guiterman v. Coutant, 112 N. Y. Supp. 900.

60. **Extradition**—Fugitive From Justice.—Petitioner held a fugitive from justice, where he removed from Alabama, where the offense was committed, though he remained there a considerable time, to the knowledge of the authorities, and then removed to Georgia, and then to Texas.—Ex parte Coleman, Tex., 113 S. W. 17.

61. **Federal Courts**—Suits Against State.—A suit in a federal court by creditors of the South Carolina State Dispensary Commission, created by Act Feb. 16, 1907 (Sess. Laws 1907, pp. 463,

835), held not one against the state, within the eleventh constitutional amendment.—Murray v. Wilson Distilling Co., U. S. C. C. of App., Fourth Circuit, 164 Fed. 1.

62. **Fish**—Prohibiting Fishing.—Under Pen. Code, Sec. 634, prohibiting fishing with certain nets, held immaterial to accused's guilt whether they acted as fishermen, merchants, or merchants' employees.—People v. Russo, Cal., 97 Pac. 700.

63. **Frauds, Statute of**—Correspondence Between Parties.—Where a contract of sale of real estate can be ascertained from the entire correspondence between the parties, together with an abstract of title transmitted for the purchaser's inspection, there is a sufficient memorandum to satisfy the statute of frauds.—Heenan & Finlen v. Parmele, Neb., 118 N. W. 324.

64. **Habeas Corpus**—Decisions of Immigration Laws.—Under Immigration Act, the decision of the appropriate immigration officers adverse to the admission of an alien is conclusive, unless reversed on appeal by the Secretary of Commerce and Labor, and cannot be reviewed by the courts on writ of habeas corpus.—United States v. Watchorn, U. S. C. C., S. D. N. Y., 164 Fed. 159.

65.——Grounds for Relief.—An alleged fugitive from justice in extradition proceedings will not be discharged on habeas corpus because of substantial defects in the indictment under the laws of the demanding state.—Ex parte Coleman, Tex., 113 S. W. 17.

66. **Highways**—Obstruction.—The county held not estopped by silence from claiming that plaintiff's fence was an obstruction to the highway.—Quinn v. Monona County, Iowa, 117 N. W. 1100.

67. **Injunction**—Patents.—The action of a defendant in threatening suits for infringement of patents against complainant and his customers, which suits it refused to bring when invited by complainant, held to constitute unfair competition, which entitled complainant to relief in equity by an injunction and accounting.—Dittgen v. Racine Paper Goods Co., U. S. C. C., E. D. Wis., 164 Fed. 85.

68.——Subjects of Protection and Relief.—Equity will restrain an employee from making use, after termination of his employment, of his former employer's list of customers, independent of any contract, and where there is an agreement not to do so that fact furnishes an added ground for equitable interference.—Witkop & Holmes Co. v. Boyce, 112 N. Y. Supp. 874.

69. **Intoxicating Liquors**—Action for Penalties.—Certain letters and receipt from county treasurer to applicant for liquor tax certificate held to afford no protection for sales of liquor without having obtained a liquor tax certificate.—Clement v. Smith, 112 N. Y. Supp. 955.

70.——Closing Ordinances.—A village ordinance requiring closing of saloons between certain hours, unless by special permission of the president, held void as an unwarranted delegation of legislative power.—Village of Little Chute v. Van Camp, Wis., 117 N. W. 1012.

71.——Evidence of Remonstrances.—On the hearing before the excise board on an application for a liquor license, where a witness testified to circumstances establishing sales of liquor by applicant to a minor, refusal either to require the witness to disclose the name of the minor or to strike out his testimony held error.—In re Klamm, Neb., 117 N. W. 991.

72.——Grant of License.—Cities having excise boards, with exclusive power to license the sale of intoxicating liquors, cannot appeal from an order denying or granting a license.—In re Klamm, Neb., 117 N. W. 991.

73.——Illegal Sale.—Where defendant is charged with selling intoxicating liquors without a license, he is presumed to be innocent until his guilt is established beyond a reasonable doubt.—Heoman v. State, Neb., 117 N. W. 997.

74. **Judgment**—Innocent Purchaser.—An innocent purchaser from a judgment debtor, conveying by her married name property acquired under that name, takes free from a judgment docketed against her debtor in her maiden name.—Huff v. Sweetser, Cal., 97 Pac. 705.

75.——Res Judicata.—Decision of issues on appeal in another case held not res judicata of the issues in question, and material only under the doctrine of stare decisis.—Quinn v. Monona County, Iowa, 117 N. W. 1100.

76. **Landlord and Tenant**—Lease.—A lessor, relying on the cancellation of the lease by mutual consent, has the burden of showing a valid cancellation.—Lynch v. Robert P. Murphy Hotel Co., 112 N. Y. Supp. 915.

77.——Estoppel of Tenant.—While defendant in an action for rent may show that he did not rent the property from plaintiff, but from somebody else, he may not do this by showing that his lessor does not own the leased premises.—Johnson v. Tucker, Wis., 117 N. W. 1002.

78.——Former Leases.—A written farm lease having been renewed orally with an oral modification, the lease is an oral contract, at least to the extent of the modification.—Ashdown v. Ely, Iowa, 117 N. W. 976.

79.——Illegal Purpose of Lessee.—Mere knowledge or suspicion by the lessor that the lessee intends to violate the law on the property without the landlord's participation will not invalidate the contract.—Harbinson v. Shirley, Iowa, 117 N. W. 963.

80.——Landlord's Lien.—A landlord under a lease reserving a lien on produce of a farm to secure payment of rent acquired the sole property in the produce until the lien was satisfied.—Larraway v. Tillotson, Vt., 70 Atl. 1063.

81. **Limitations of Actions**—Ignorance of Rights.—The mere ignorance of a plaintiff of his cause of action will not prevent the running of the statute of limitations, but there must have been some concealment of facts which ordinary diligence could not discover.—Clapp v. Leavens, U. S. C. C. of App., Eighth Circuit, 164 Fed. 318.

82. **Master and Servant**—Assumed Risk.—Where a servant works with a piece of machinery insufficient for the purpose or for any reason unsafe, with knowledge or means of knowledge of its condition, he assumes the incidental risk, and cannot recover for injuries sustained thereby.—Bush v. Wood, Cal., 97 Pac. 709.

83.——Defective Scaffolding.—A plank placed across horses for use by workmen in the construction of a building in erecting a derrick held a "scaffold," within Labor Law (Laws 1897, p. 467, c 415) Secs. 18, 19.—Warren v. Post & McCord, 112 N. Y. Supp. 960.

84.——Duty to Warn.—Knowledge of an assistant foreman of the danger to which plaintiff was subjected at the time he was injured held the knowledge of defendant, so that it was such assistant's duty to warn, if warning was neces-

sary.—Charrier v. Boston & M. R. R., N. H., 70 Atl. 1078.

85.——Injury to Employee.—That an employee was injured through his fingers getting caught in a pulp press does not show negligence of his employer.—Burke v. International Paper Co., 112 N. Y. Supp. 893.

86.——Negligence.—That the proximate cause of a servant's death resulted from the master's negligence alleged need not be proved beyond a reasonable doubt, but only by a preponderance of the evidence.—Lunde v. Cudahy Packing Co., Iowa, 117 N. W. 1003.

87.——Safe Place to Work.—Failure of a sewerman to guard an excavation in defendant's boiler room into which plaintiff fell and was injured held not the fault of a fellow servant, but the negligence of the master in failing to provide a safe place to work.—Sparling v. United States Sugar Co., Wis., 117 N. W. 1055.

88.——Torts of Servant.—The rule that a master is not liable for a malicious act of his servant held not to relieve a master from his neglect to use reasonable means to prevent a dangerous practice carried on by his workmen. Hogle v. H. H. Franklin Mfg. Co., 112 N. Y. Supp. 881.

89. **Mechanics' Lien**—Enforcement.—Where the owner of premises holding funds for those contractors and subcontractors entitled thereto could not safely pay it over before judgment in the proceedings determining their rights, he was not chargeable with interest thereon.—Hurley v. Tucker, 112 N. Y. Supp. 989.

90. **Mines and Minerals**—Injunctions.—On an application for an injunction ancillary to ejectment to recover mining ground, it was not necessary to show that defendants were insolvent; the alleged injury being irreparable in itself.—Waskey v. McNaught, U. S. C. C. of App., Ninth Circuit, 163 Fed. 929.

91. **Mortgages**—Construction and Operation.—Collateral mortgage held not security for the entire debt, but only for a certain sum, less than the mortgage debt, on the payment of which it was stipulated the mortgage would be discharged.—Abert v. Kornfeld, 112 N. Y. Supp. 884.

92. **Municipal Corporations**—Assessments for Improvements.—If the city council, because of some act or omission, is wholly without jurisdiction to levy special assessments for local improvements, the jurisdictional question may be raised at any time and in any kind of proceeding.—Andre v. City of Burlington, Iowa, 117 N. W. 1082.

93.——Assessments for Improvements.—Objections to an assessment for benefits by a city council that it was contrary to the laws of the state and the ordinance of the city, and was not levied according to law, are too indefinite to be considered on appeal.—Andre v. City of Burlington Iowa, 117 N. W. 1082.

94.——Explosion of Dynamite in Street.—New York City is not liable for injury caused by an explosion of dynamite stored in a street by a subcontractor in constructing a section of the rapid transit subway in excess of a permit given by the fire commissioner.—Murphy v. City of New York, 112 N. Y. Supp. 807.

95.——Ordinances Affecting Sale of Poultry.—An ordinance regulating the sale of poultry held to transfer from the buyer to the seller the duty of performing that which one or the other must perform.—People v. Reicherter, 112 N. Y. Supp. 936.

96.——Vacation of Alley.—Where an alley was duly vacated by a city ordinance, it ceased to be a public way, and, if it thereafter continued open to the use of the public, it was a matter of sufferance only, not affecting the result of the vacation.—Bradley v. City of Centerville, Iowa, 117 N. W. 968.

97. **Negligence**—Injury to Trespassers.—In the absence of intentional injury, the owner or possessor of land is not liable to trespassers except in the case of active intervention, not being liable for a mere antecedent condition of the premises.—Hobbs v. George W. Blanchard & Sons Co., N. H., 70 Atl. 1082.

98.——Questions for Jury.—When the case as made by plaintiff himself so clearly reveals his want of due care as to leave no room for difference of opinion among fair-minded men, his negligence is established as a matter of law, and there is no issue for the jury.—Williams v. Chicago, M. & St. P. Ry. Co., Iowa, 117 N. W. 956.

99. **Patents**—Double Use.—The application of a device to a new use, so closely related to a prior one that the applicability of the device to the new use would occur to a person of ordinary mechanical skill, does not involve invention.—Lewis Blind Stitch Mach. Co. v. Premium Mfg. Co., U. S. C. C. of App., Eighth Circuit, 163 Fed. 950.

100.——Right to Patent.—One who has discovered a new principle in a machine does not lose his right as inventor to a patent therefor, because he employs another to put it in working shape, nor because such other may suggest minor features or improvements.—Eastern Dynamite Co. v. Keystone Powder Mfg. Co., U. S. C. C., M. D. Pa., 164 Fed. 47.

101. **Physicians and Surgeons**—Police Power of State.—The granting of a certificate to practice medicine and its revocation are an exercise of the police power of the state identical in their objects and power.—Smith v. State Board of Medical Examiners, Iowa, 117 N. W. 1116.

102. **Post Office**—Liability of Recipient.—Whoever deals with an agent of the United States must assure himself of the agent's authority, and one in whose favor a postmaster or postal clerk issues a money order without first receiving an application and payment therefor, as required by law, is liable to the United States for its value, although he may have paid such agent in good faith in other ways the full value of the order.—United States v. Bolognesi, U. S. C. C., S. D. N. Y., 164 Fed. 159.

103. **Railroads**—Contributory Negligence.—The driver of a vehicle whose negligence directly contributed to a collision with a train at a crossing and precluded recovery for personal injuries could not recover for the injuries to his team and vehicle.—Williams v. Chicago, M. & St. P. Ry. Co., Iowa, 117 N. W. 956.

104.——Stop, Look and Listen.—A person about to cross the track of an interurban electric railway, on which trains are customarily operated at high speed, must stop, look, and listen, unless it would be of no avail.—Cable v. Spokane & Inland Empire R. Co., Wash., 97 Pac. 744.

105.——Who Are Passengers.—A passenger who descended from a train for exercise while the train stopped, intending to resume his journey, continued while so temporarily on the

station platform to be a passenger.—Gannon v. Chicago, R. I. & P. Ry. Co., Iowa, 117 N. W. 966.

106. **Removal of Causes**—Diversity of Citizenship.—To render an action removable to the federal court on the ground of diversity of citizenship, such diversity must exist at the beginning of the suit, and when petition for removal is filed.—O'Connor v. Chicago, R. I. & P. Ry. Co., Iowa, 117 N. W. 979.

107.——Effect of Counterclaim.—A plaintiff in a suit in a state court for the recovery of a sum less than $2,000 does not become theoretically or constructively a defendant, so as to entitle him to remove the cause on the ground of diversity of citizenship, because the defendant in his answer sets up a counterclaim for more than $2,000, as permitted by the statute of the state.—Illinois Cent. R. Co. v. A. Waller & Co., U. S. C. C., W. D. Ky., 164 Fed. 358.

108. **Sales**—Absolute or Conditional.—Property held by a bankrupt in Minnesota under a contract of conditional sale, although unrecorded, may be reclaimed by the seller; the failure to record rendering the contract voidable under the state statute only as against lien creditors.—Monitor Drill Co. v. Mercer, U. S. C. C. of App., Eighth Circuit, 163 Fed. 943.

109.——Contract.—A seller held not entitled to complain that the buyer did not comply with a provision of a contract requiring him to furnish labels for the goods purchased.—Ellsworth v. Knowles, Cal., 97 Pac. 690.

110.——Sunday Contracts.—Where defendant agreed on Sunday to sell plaintiff, on credit, a car load of potatoes, which were examined and unloaded on Monday, defendant could recover therefor on a quantum meruit, the void Sunday contract not governing as to price.—King v. Graef, Wis., 117 N. W. 1058.

111. **Shipping**—Explosives.—An explosion in the hold of a steamship when it was opened at the end of a voyage, and stevedores entered to discharge cargo, held on the evidence to have been caused by the vapor escaping from a shipment of "naptha" soap, which, with the air, formed an explosive mixture.—International Mercantile Marine Co. v. Fels, U. S. D. C., S. D. N. Y., 164 Fed. 337.

112.——Injury to Stevedore.—When a vessel has employed independent contractors to load and stow the cargo, and has turned the vessel over to them in a safe condition, she is relieved from liability for an injury to an employee of the stevedores arising from a danger created by the manner in which they did the work.—The Clan Graham, U. S. D. C., D. Oregon, 163 Fed. 961.

113. **Specific Performance**—Unconscionable Contracts.—A contract for the sale of phosphate rock underlying certain land held not so unconscionable nor based on such a grossly inadequate consideration as would justify the refusal of specific performance.—Bradley v. Heyward, U. S. C. C., D. S. Car., 164 Fed. 107.

114. **States**—Compensation of Legislators.—The passage of Laws 1907, p. 307, c. 229, increasing the salary of the members does not disqualify members of the House of Representatives of that session from being eligible as candidates to succeed themselves for the term commencing January 1, 1909.—State v. Scott, Minn., 117 N. W. 1044.

115. **Street Railroads**—Imputed Negligence.—Where a wife riding with her husband had nothing to do with the driving, but deferred entirely to his judgment, held, that it was not manifest error to find that she was not chargeable with negligence.—Denis v. Lewiston, B. & B. St. Ry. Co., Me., 70 Atl. 1047.

116.——Injury to Passenger on Running Board.—Whether a street railway passenger was guilty of contributory negligence in riding on the running board when injured was a question of fact—Betz v. Rhode Island Co., R. I., 70 Atl. 1058.

117.——Frightening Horses.—The conditions stated under which a street railroad would be liable for injuries resulting from frightening the horse drawing a passing vehicle by sounding the gong, or by suddenly increasing speed so as to cause a collision with the vehicle.—Sauter v. International Ry. Co., 112 N. Y. Supp. 863.

118. **Telegraphs and Telephones**—Contracts for Service.—A private citizen, contracting with a telephone company for service at a different rate than that prescribed by its franchise, held not entitled to repudiate his contract and demand service according to the franchise.—Buffalo Merchants' Delivery Co. v. Frontier Telephone Co., 112 N. Y. Supp. 862.

119. **Trade-Marks and Trade-Names**—Descriptive Terms.—The words "Flare Front" as applied to automobile lamps, the shell of which flares in front to inclose a large glass, are descriptive, and cannot be monopolized by a single manufacturer.—Rushmore v. Manhattan Screw & Stamping Works, U. S. C. C. of App., Second Circuit, 163 Fed. 939.

120. **Trial**—Motion for Nonsuit.—A motion for nonsuit presents a question of law for the court, and amounts to a demurrer to the evidence, or an objection that, admitting all the proved material facts to be true, they do not in legal effect entitle plaintiff to the relief asked.—Bush v. Wood, Cal., 97 Pac. 709.

121. **Vendor and Purchaser**—Deeds.—Right of re-entry after breach of a condition in a deed held not destroyed by the acceptance of a deed from the referee in bankruptcy proceedings against the person to whom the premises had been conveyed on such condition.—Fowler v. Coates, 112 N. Y. Supp. 849.

122.——Equitable Lien.—A vendor's equitable lien to secure the purchase price does not arise until the purchaser defaults.—Vance Redwood Lumber Co. v. Durphy, Cal., 97 Pac. 702.

123.——Offer to Sell.—Acceptance of an offer to sell land, but fixing a place other than the residence of the vendor or the place named in the offer for the payment of the consideration and the delivery of the deed, is not an unconditional acceptance.—Lopeman v. Colburn, Neb., 118 N. W. 116.

124.——Title of Vendee.—Where a vendee merely holds a contract binding the vendor to execute a deed on payment of the purchase money, as long as the purchase money remains unpaid, the vendee owns neither the legal nor the equitable estate.—Standard Leather Co. v. Mercantile Town Mut. Ins. Co., Mo., 111 S. W. 631.

125. **Venue**—Change of Place of Trial.—While the granting of a change of venue is largely in the discretion of the court, facts justifying the change must be stated in the moving papers before the court may exercise its discretion.—Noonan v. Luther, 112 N. Y. Supp. 898.